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**III. FOR MILLIONS OF CONSUMERS WITHOUT ACCESS TO
CABLE THIS WOULD BE A MERGER TO MONOPOLY**

In their Application, EchoStar and DIRECTV claimed that “over 96 percent” of television households were passed by cable.⁶⁴ When NRTC pointed out the implausibility of this figure,⁶⁵

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⁶⁴ Application at 39-40.

the Applicants attempted to discredit the NRTC's analysis and dismissed it as a "red herring that is not decisionally significant."⁶⁶

Contrary to the DBS companies' attempts to minimize the number of homes not passed

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⁶⁵ Petition to Deny by The National Rural Telecommunications Cooperative at 6-16, CS Docket No. 01-348 (filed Feb. 4, 2002).

⁶⁶ Opposition at 60-66.

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DIRECTV itself reported to the Commission in 2001 that 29% of its subscribers did not have cable access.⁷¹

The picture that emerges is clear. While, over time, as they have grown into a stronger competitive force, the two DBS companies have increased the number of new subscribers they obtain from cabled areas a very large proportion of their subscribers by their own count (29% for DIRECTV; **REDACTED** for EchoStar) are not passed by cable. In fact, a study submitted to the Commission as part of an EchoStar and DIRECTV ex parte filing reports that only 64% of DBS households have cable access and that for the U.S. as a whole the figure is 87%.⁷² Thus, the “over 96 percent” figure originally cited by the Applicants is wrong by their own admission. The correct number may well be as low as the 81% cited by the National Telecommunications and Information Administration and Rural Utilities Service.⁷³ Further, approximately 15 million of those with cable access are passed by antiquated analog cable systems that are likely to go extinct in the next few years.⁷⁴ Overall, one can assume conservatively that more than 20 million households⁷⁵ will ultimately be subject to an MVPD monopoly if this merger proceeds.

⁷¹ DIRECTV, Inc. Comments, *In The Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, at 13 (filed Aug. 23, 2001).

⁷² Taylor Research & Consulting Group, Inc. study attached to (May 3, 2002) Ex Parte Notice of EchoStar Communications Corp., General Motors Corp. & Hughes Electronics Corp., in CS Docket No. 01-348 (filed May 3, 2002).

⁷³ National Telecommunications & Information Administration, United States Department of Commerce & Rural Utilities Service, United States Department of Agriculture, *Advanced Telecommunications in Rural America: The Challenge of Bringing Broadband Service to All Americans*, at 19 & n.62 (Apr. 2000).

⁷⁴ See NAB Comments, *In The Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, at 7-8 & n.28 (filed Aug. 30, 2002).

⁷⁵ *Id.*

IV. THE APPLICANTS' CLAIM OF A NATIONAL MARKET IS NOT CREDIBLE NOR IS THEIR PROMISE OF A UNIFORM NATIONAL PRICE

A. What The Applicants Claim: A National Market

The Applicants make the truly audacious claim that the relevant geographic market is national:

Since each firm prices nationally – and New EchoStar has committed to continue that practice – the appropriate geographical market is national.⁷⁶

Within the “national” market they find the concentration level to be so low as to be within the Merger Guidelines “safe harbor.”⁷⁷ However, the proposition that the MVPD market is national actually flies in the face of the Merger Guidelines, which define the boundary of a market as the smallest region in which a hypothetical monopolist could profitably impose a “small but significant and nontransitory” price increase.⁷⁸ In a previous matter involving a satellite MVPD, the Department of Justice explained that:

The set of MVPD providers able to offer service to individual consumers' residences will generally be the same throughout each local community, but will differ from one local community to another. For ease of analysis, therefore, it is useful to aggregate consumers who face the same competitive choices in MVPD providers for example by specific zip codes or local cable franchise areas.⁷⁹

⁷⁶ Ex Parte filing of EchoStar Communications Corp., Hughes Electronics Corp. & General Motors Corp., in CS Docket No. 01-348, at 17 (filed June 28, 2002).

⁷⁷ *Id.* at 18-19.

⁷⁸ Department of Justice & Federal Trade Commission, 1992 *Merger Guidelines* §1.21.

⁷⁹ Complaint ¶ 70, *United States v. Primestar, Inc.*, No. 1:98CV01193 (D.D.C. filed May 12, 1998).

The Applicants can only reach the conclusion that there is a single, national MVPD market if they assume that a cable company operating in Washington, D.C. is a viable alternative to one franchised in Los Angeles for Los Angeles consumers. This assumption is absurd on its face and, as shown below, is contradicted by the Applicants' own voluminous documents which analyze competition in local markets in minute detail.

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Of course, the reason the Applicants wish to avoid admitting that MVPD markets are local is because if they do, they would have to admit that the HHI's in virtually all local markets would be in the highly concentrated category pre-merger and in many local markets would reach a perfectly concentrated 10,000 post-merger due to the elimination of all competition.⁸¹

⁸⁰ See *Merger Guidelines* § 1.22.

⁸¹ A market with an HHI over 1800 is considered to be "highly concentrated." Where a merger in such a market increases the HHI by over 100 points, as this merger would in virtually all local markets "it will be presumed" that the merger is "likely to create or enhance market power or facilitate its exercise." *Merger Guidelines* § 1.51.

B. What The Applicants' Documents Show: Local MVPD Markets

1. The Applicants Have the Capability to Target Local Markets

There is no question but that both DIRECTV and EchoStar are capable of targeting virtually any segment of the population they choose.

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2. Both DIRECTV and EchoStar Increasingly Are Targeting Local Markets

While the Applicants have only produced for inspection a limited number of marketing documents, it seems clear not only that they target local markets, but that they do so increasingly.

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What one can be certain of is that if it makes economic sense for a DBS monopolist to charge more where it faces no competition than it charges where it faces at least one competitor, it will find a way to do so, as certainly as water seeks its own level. For the Commission or any other governmental body to try to enforce a national pricing promise would be not only totally unworkable but also a regulatory disaster – particularly given that it would be trying to enforce a national price on EchoStar, a company that has violated even clear Commission rules with impunity.

V. LOCAL-TO-LOCAL CARRIAGE IS OF VITAL IMPORTANCE TO BOTH DBS COMPANIES AND IS A KEY ELEMENT OF THEIR RIVALRY

In earlier filings, NAB provided evidence that carriage of local stations by DIRECTV and EchoStar was more likely to be advanced by the competitive rivalry of the two DBS companies than by a merged DBS monopolist, whatever the promises it might make to get its merger approved.

The EchoStar and DIRECTV documents supplied to the Commission support NAB's reliance on competition as the best assurance of the carriage of local stations by satellite. Such carriage had its inception in EchoStar's drive to overcome its underdog status as the second DBS provider; the spread of local carriage since the passage of SHVIA has been due to the rivalry between the two, in addition to the economic benefit each obtains from carrying the local stations in a market.

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B. The Economic Benefits to the DBS Companies of Local-to-Local Carriage

The drive of each DBS company to be the first to carry local stations in a market arises from the economic benefits to be gained from such carriage: increased subscribership or “lift” in a locality whose local channels they carry; additional revenues from those subscribers who take the local channels; and decreased churn.

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industry's 40% growth in 2000 was primarily the result of SHVLA's passage¹²⁵ and local carriage has continued to be a catalyst for DBS growth.

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**C. Competition for Local-to-Local Carriage Is a Key Ingredient
in the Existing DIRECTV-EchoStar Rivalry**

The desire to be first into a local market and to carry stations in more local markets than the other DBS company has accelerated the proliferation of local market carriage, as has the fear of not carrying local stations in a market where the other DBS company does so, as DIRECTV and EchoStar's documents show.

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¹²⁵ SBCA Comments, *In Re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 11-132 (filed July 2000).

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It is this rivalry among DBS competitors, combined with the economic gain they obtain from local carriage, both demonstrated by their own documents, that is the best assurance that satellite carriage of local broadcast stations will continue to spread. Such market-based incentives are much more to be trusted than the dubious promises of a would-be monopolist.

VI. CONCLUSION

The Applicants realized from the start that under any standard antitrust or public interest analysis their merger would stand condemned. Therefore, they resorted to a series of implausible arguments to save their merger: (1) the competition between them is insignificant, in fact less than each faces from antenna service; (2) in any event, nearly all Americans are served by cable, so that even if the first argument fails, hardly anyone would be subject to a monopoly; (3) there is a single, national MVPD market, not a series of local markets; and (4) the Applicants charge a uniform national price now and their promise to do so in the future can be trusted.

However, an examination of the Applicants' own documents shows these claims to be without basis in fact. The two DBS companies react constantly to each other's competitive activity and constrain each other's pricing behavior, the most basic measure of competition. The degree of competition between EchoStar and DIRECTV is far greater than either has with cable (much less antenna). Many millions of their own customers without access to cable, as well as millions of other Americans, would be subject to a monopoly if this competition were lost.

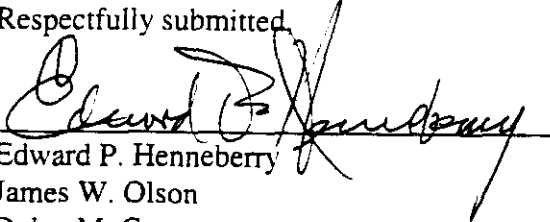
The Applicants' claim of a single, national MVPD market is the least credible of all. Not only does it run counter to all legal and economic precedent, but EchoStar and DIRECTV's documents are replete with discussions of local markets and local promotional activities,

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including price discounts in all shapes and sizes. It is also the rivalry to gain subscribers in localized markets that will lead to the further spread of local-to-local carriage by the DBS companies.

An analysis of the Applicants' documents strips aside the layer of flimsy arguments they have put forth to hide the blunt reality that has been evident from the beginning: this is a merger to monopoly for millions of consumers and, at best, a merger to duopoly for nearly all other Americans. Its consummation would cause prices in MVPD markets across the country to rise and quality to decline. For these reasons, the Commission should deny the Application for Authority to Transfer Control.

Respectfully submitted,



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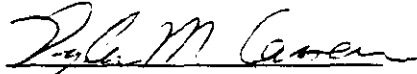
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September 11, 2002

CERTIFICATE OF SERVICE

I, Dylan M. Carson, do hereby certify that on the 11th day of September, 2002, I caused true and correct copies of the foregoing Ex Parte Analysis of EchoStar and DIRECTV Confidential Documents (Redacted) to be served by hand upon the parties on the attached service list.


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